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April 10, 2009

Office of Administrative Law
Staff Counsel
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Re: Proposed Emergency Regulations Readoption File No. 2009-0324-01EE

Dear OAL Staff Counsel:

Secretary of State Debra Bowen submits this letter in response to the additional comments and objections submitted to the above-captioned proposed emergency regulations. We have received additional comments, concerns, or objections to the proposed emergency regulations from the following individuals:

- Janice Atkinson, Clerk-Recorder-Assessor, Sonoma County
- Gail L. Pellerin, County Clerk, Santa Cruz County
- Deborah Seiler, Registrar of Voters, San Diego County
- Stephen L. Weir, County Clerk/Recorder, Contra Costa County

Rather than restate the portions of our April 3, 2009, letter which respond to similar public comments, and the relevant portions of the Finding of Emergency submitted as part of the proposed readoption package, this letter incorporates by reference our responses in those documents regarding the following issues: 1) the existence of an emergency; 2) the Secretary of State's legal authority pursuant to *County of San Diego v. Debra Bowen* (2008) 166 Cal.App.4th 501 to adopt regulations; 3) the need for the proposed regulations to address the emergency and to ensure the integrity and accuracy of results in close contests; and 4) steps taken to minimize costs counties may incur.

The Post Election Manual Tally Working Group Held Several Meetings and Has Provided Valuable Input to the Secretary of State on Modifying the PEMT Regulations.

Ms. Seiler states the Secretary of State's Post Election Manual Tally Working Group has met only sporadically. In fact, the Working Group held conference calls on the following Wednesdays: January 14, January 21, February 4, March 11, and March 18. Aside from conference calls there were a number of email communications among the group during that time period. The Working Group did not hold its weekly conference call on February 11, February 18, and February 25, when the Secretary's decisions on proposed changes to the regulations were pending. However, on March 4th our office sent an email memo to the Working Group communicating in detail the Secretary's proposal to alter the existing emergency regulations in advance of the May 19th election. A follow-up email was sent on March 6, which contained a redline version of those proposed changes.

The Working Group reviewed and discussed those changes during its March 11 and March 18 conference calls.

Ms. Atkinson points out a number of counties had problems interpreting and implementing the regulations. The PEMT emergency regulations submitted for readoption address a number of these problems. The overall goals of the Working Group have been to improve and modify the existing PEMT emergency regulations to make them more effective and workable for counties, reduce costs where possible, and explore alternatives to the PEMT requirements.

Ms. Seiler states the members of the Working Group do not support the proposed emergency regulations. Our office certainly understands that the county registrars of voters who served as members of the Working Group do not, by virtue of serving on the Working Group, support regulations requiring counties to conduct a manual tally of a certain percentage of precincts in close contests as a method of ensuring the integrity and accuracy of the voting system tally of those contests.

While the members of the Working Group may not support the proposed emergency regulations, our office has certainly appreciated the valuable input the members have provided, which has helped our office better understand some of the practical challenges associated with implementing the PEMT, the potential costs counties may incur, and the fact that audits conducted during the canvass period may not be as effective as automatic recounts conducted after the close of canvass for close contests. The proposed emergency regulations reflect modifications to the previous emergency regulations that address these issues to the extent possible.

The PEMT Emergency Regulations Serve to Verify Election Outcomes and Check the Security, Accuracy and Reliability of Voting Systems

Ms. Pellerin and Ms. Atkinson assert there is no clear objective for the PEMT Emergency Regulations. This assertion appears to be based on a belief that the PEMT can only serve one objective. The Secretary of State firmly believes PEMT audits can serve two purposes: 1) to verify election outcomes; and 2) to check the security, accuracy and reliability of voting systems. Traditionally, many counties did not track, explain, and resolve variances discovered in the 1% manual tally (required by Elections Code section 15360) that were the result of “voter intent” errors, i.e. voters mis-marking their ballots in a fashion that caused the machine to misread the votes on the ballot. The PEMT emergency regulations require counties to track, explain, and resolve *all* variances – not just those due to voting system malfunction – when conducting a PEMT audit. Therefore, the PEMT increases the chances of discovering voting system malfunction *and* helps determine whether the machine tally winner is correct based on how high the variance rate is inside the sample and how close the margin of victory is in the contest.

Counties May Submit an SB 90 Reimbursement Claim to the Commission on State Mandates, Governor Has Promised Reimbursement

Ms. Seiler states counties do not expect the Legislature to fully reimburse them for past election costs, and therefore it's unrealistic to expect full reimbursement for election costs directly associated with complying with PEMT audit requirements. While the Legislature may not appropriate sufficient money in future state budgets to cover county election costs, including the costs of complying with the PEMT audit requirements, the CACEO is currently gathering PEMT cost data from counties in preparation for submitting a reimbursement claim to the Commission on State Mandates in the coming months.

Furthermore, Ms. Seiler neglects to mention the actions taken by the Legislature and the Secretary of State to ensure counties were fully reimbursed for the February 2008 Presidential Primary Election. This office worked extensively with the counties, the Legislature, and the Governor's office to ensure that counties were able to justify their election expenses and that they were reimbursed for those expenses. In the end, counties were reimbursed for 100% of their expenses in AB 1781 (Laird), Chapter 268, Statutes of 2008.

Finally, along these same lines, it is worth noting that in signing SB 19xxx (Ducheny), Chapter 7, Statutes of 2009-10 Third Extraordinary Session, which called the Statewide Special Election for May 19, 2009, the Governor issued a signing message, which reads in part:

However, calling a special election does not come without costs to California counties. As such, I am signing this measure with the understanding that the Legislature will reimburse counties for the costs of the election as soon as possible.

Potential Alternatives to PEMT Emergency Regulations Are Under Consideration

Ms. Seiler and Mr. Weir suggest automatic recounts as a reasonable alternative to the PEMT regulations. The Secretary would support legislation to require automatic recounts for close contests and is currently exploring the possibility of working jointly with members of the California Association of Clerks and Election Officials (CACEO) on such legislation. However, until such new laws are in place, PEMT audit requirements should remain in effect.

Government Code Section 11349.1(d)(3) Does Not Apply To Emergency Regulations

Finally, Ms. Seiler and Ms. Atkinson assert the provisions of Government Code section 11349.1(d)(3) apply to the promulgation of emergency regulations. San Diego County filed a legal challenge to the previously adopted PEMT emergency regulations based on this claim but later withdrew the claim and requested dismissal of the case. See *County*

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of San Diego v. OAL, San Diego County Superior Court, Case No. 37-2008-0009-4494-CU-MC-CTL. None of Government Code section 11349(d), and specifically nothing in section 11349(d)(3) applies to the adoption or readoption of emergency regulations.

For all these reasons and the reasons stated in our public comment response letter submitted April 3, 2009, as well as the Finding of Emergency submitted as part of the proposed readoption package, the Secretary of State requests that OAL approve readoption of the emergency regulations.

Sincerely,



Jennie Bretschneider
Assistant Chief Deputy Secretary of State